by the seller. In fact, there is some authority that the injunction will be denied only where the misrepresentations would constitute a defense to an action at law.[9] At law, the doctrine of "seller's talk" in advertising his goods is recognized, and though the tendency is toward narrowing this principle, many statements of opinion which are very close to the line of actual misrepresentations are allowed, though less is required for inequitable conduct than for actual fraud. That something of the same principle is recognized in equity may be seen in numerous cases.[10] The case under discussion seems one particularly suited for the application of such a principle. The plaintiff's business is one in which truth as to surrounding circumstances is often disregarded, and the public is well aware of this. It is hardly conceivable that any great number of the public would be deceived by a trick such as the plaintiff's any more than by a magician. Acts of this kind are a common and well-understood part of American vaudeville. The public wants to be deceived as part of the show. The denial of relief in this case pushes the doctrine of "unclean hands" to an extreme point. The judges of a court of chancery, however, are frequently of a loftier moral character than the components of a jury, and this perhaps explains in part why conduct of a more scrupulous character is more often required in equity than at law.[11]

RECENT CASES

ADMINISTRATIVE LAW — REVIEW OF ADMINISTRATIVE PROCEEDINGS ON *CERTIORARI*. — A statute provided that the state printing board should award the state printing contract to the lowest responsible bidder. (1909, N. Y. LAWS, c. 60, § 6.) The board awarded the contract to the second lowest bidder, and the lowest bidder seeks to have the proceedings reviewed on *certiorari*. *Held*, that the writ will not lie. *People ex rel. Argus Co.* v. *Hugo*, 168 N. Y. Supp. 25.

By the general common-law rule *certiorari* will lie to review only such proceedings of an administrative body as are judicial in their nature. *Degge* v. *Hitchcock*, 229 U. S. 162. See 1 BAILEY, HABEAS CORPUS, § 171. This rule is recognized in all jurisdictions except New Jersey. *Treasurer* v. *Mulford*, 26 N. J. L. 49. In North and South Dakota the New Jersey exception has been established by statute. *State* v. *Clark*, 21 N. D. 517; *State* v. *Hughes County*, 1 S. D. 292. The line of demarcation between judicial and nonjudicial proceedings is obscure. For the purposes of the present problem a distinction should be drawn between the questions whether an administrative body in acting

---

[9] Ford *v.* Foster, *supra*.

[10] Newbro *v.* Undeland, 69 Neb. 821, 96 N. W. 635 (Claims that a hair-restorer is an absolute cure for baldness are mere statements of opinion). California Fig Syrup Co. *v.* Worden, 95 Fed. 132 (Court declined to investigate truth of advertisement that compound is a sure cure for constipation). Samuel Brothers *v.* Hostetter Co., 118 Fed. 257.

[11] M. D. Chalmers, "Trial by Jury in Civil Cases," 7 L. QUART. REV. 15, 19 ("But the morality of juries is a sublunary, man-in-the-street sort of morality. It is wholly distinct from the sublimated morality of non-jury tribunals such as courts of equity").

has complied with constitutional or legislative provisions as to how it shall act, and whether after it has so complied it may then reach its decision as a matter of personal discretion, or whether, according to the intent of the constitution or statute applicable, it is to be bound by law and the rules of legal procedure in reaching its ultimate finding. Thus in a statute like that in the present case the legislature might well provide that the administrative body shall not pass on the question of responsibility without a hearing accorded to parties interested, even though the ultimate decision as to responsibility in its nature must be left to the untrammeled personal judgment of the board. The former is a question of whether the administrative body has acted in a legal manner, which is always a judicial question open to review by the courts. *New York* v. *McCall*, 38 Sup. Ct. Rep. 122. But *cf. Local Government Board* v. *Arlidge*, [1915] A. C. 120. Whether the statute in the principal case requires a hearing is a matter of sound construction. In a recent New Jersey case construing a similar statute such a requirement was found. *Kelly* v. *Board of Chosen Freeholders of Essex County*, 101 Atl. 422 (N. J.). But since in the interest of expeditious administration of government the letting of a contract for state work should be a summary matter it is submitted that, other things being equal, the construction adopted by the court in the present case is the better one. This result has been reached in other jurisdictions. *Hammer* v. *Smith*, 11 Ariz. 420; *Newell* v. *Franklin*, 30 R. I. 258.

AGENCY — CREATION OF AGENCY — NECESSITY OF CONSIDERATION. — Because of an overcharge by the defendant company plaintiff was entitled to a rebate, which could be paid only with the consent of the Interstate Commerce Commission. Defendant informed plaintiff that if he would execute the necessary papers it would procure such consent. Papers were executed and delivered to the defendant, but it failed to act further during the period for securing the rebate. *Held*, that the plaintiff is entitled to damages caused by defendant's failure to secure consent to the rebate. *Carr* v. *Maine Cent. R. R.*, 102 Atl. 532 (N. H.).

It is the general rule that there may be a recovery for negligent performance of a gratuitous undertaking. *Black* v. *New York, etc. R. Co.*, 193 Mass. 448, 79 N. E. 797; *Hyde* v. *Moffat*, 16 Vt. 271; *Dyche* v. *Vicksburg, etc. R. Co.*, 79 Miss. 361. But there can be no recovery on a gratuitous promise to act. *Benden* v. *Manning*, 2 N. H. 289. The same general rules apply to gratuitous agency. *Wilson* v. *Brett*, 11 M. & W. 113; *Baxter* v. *Jones*, 6 Ont. L. R. 360; *Thorn* v. *Deas*, 4 Johns. (N. Y.) 84. The reason a person who gratuitously undertakes to perform some service for another finds himself under a legal duty to perform that service with due care is that trust is reposed in him, and he must be true to that trust. See *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 919. See also Joseph H. Beale, "Gratuitous Undertakings," 5 HARV. L. REV. 222. Having in mind the true reason for the liability and the recognized distinction between nonfeasance and misfeasance, it seems that the proper place at which to draw the line between them is at that point where the agent has so far entered into the transaction as to justify placing trust in him. The plaintiff in the principal case would naturally rely on the defendant when it had gone so far as to secure the materials without which no action could be taken.

ATTORNEY AND CLIENT — PRACTICE OF LAW BY CORPORATION — WHAT CONSTITUTES PRACTICE OF LAW — DRAWING OF LEGAL DOCUMENTS. — A trust company advertised that it would furnish advice in the drawing of wills. The company employed attorneys to whom applicants were directed, no charge being made by the trust company for this service. The company ordinarily was named executor in the will. A statute forbids corporations to practise law. [N. Y. PENAL LAW (CONSOL. LAWS, c. 40), § 280.] *Held*, that the